IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SECOND APPEAL No. 306 of 1981

For Approval and Signature:

HONOURABLE MR.JUSTICE K.M.MEHTA

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1 Whether Reporters of Local Papers may be allowed to see the judgment ? No

2 To be referred to the Reporter or not ? No

3 Whether their Lordships wish to see the fair copy of the judgment ? No

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ? No

5 Whether it is to be circulated to the civil judge ? No

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PRAJAPATI NANJI KARAMSHI & 4 - Appellant(s)
Versus
PRAJAPATI BODHABHAI MOTIBHAI - Defendant(s)

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Appearance :
MR DK ACHARYA for Appellant(s) : 1.2.1, 1.2.2,1.2.3 MR YH VYAS for Appellant(s) : 1.2.1, 1.2.2,1.2.3 None for Appellant(s) : None for Petitioner No(s).: for Appellant(s) : 2 - 5.
MS SAMIRA SHAH FOR MR SN SOPARKAR for Defendant(s) : 1,
None for Defendant(s) : 1.2.1, 1.2.2, 1.2.3,1.2.4

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CORAM : HONOURABLE MR.JUSTICE K.M.MEHTA

Date : 08/03/2006

ORAL JUDGMENT

1. Heirs of deceased Karamshi Sava, i.e. Prajapati Nanji Karamshi and others, appellants – original

defendants have filed this Second Appeal under Section 100 of the Code of Civil Procedure, challenging the judgment and decree dated 10th April, 1981, passed by the learned Joint District Judge, Palanpur in Regular Civil Appeal No.11 of 1978. The learned Judge by his impugned judgment and decree was pleased to dismiss the appeal of the appellants-original defendants. The learned Judge was pleased to dismiss the appeal subject to condition that the order of trial court appointing Commissioner for effecting the partition of the suit lands is set aside and the matter is referred to the Collector for partition of the suit fields by metes and bounds for awarding ½ share therein to the original plaintiffs as prescribed by law. The learned Judge was pleased to confirm the judgment and decree dated 31st January, 1978, passed by the learned Civil Judge (J.D.), Shihori at Deodar in Regular Civil Suit No.50 of 1974 filed by the original plaintiffs i.e., heirs of deceased Moti Okha i.e., Prajapati Bodhabhai Motibhai and others - respondents herein.

2. The facts giving rise to this appeal are as under:-

2.1 There was one Kasabhai. Kasabhai has two sons Okhabai and Savabhai. Okhabhai has one son Motibhai, his wife named as Jiviben. Motibhai has two sons, one Bodhabhai and another Ishwarbhai and two daughters one Kantaben and another Rukhiben. The heirs of Motibhai i.e. Bodhabhai is plaintiff No.1, Ishwarbhai is plaintiff No.2, Kantaben is plaintiff No.4 and Rukhiben is plaintiff No.5. Kasabhai has another son Savabhai and Savabhai has two sons Jethabhai and Karamsihbhai. Karamsihbhai's wife is Maniben who is defendant No.1/3 and Nanji Karamshi Prajapati and Jivan Karamshi Prajapati are the heirs of deceased Karamshi Sava and they are defendants No.1/1 and ½ and Karamshi's brother Jethabhai is defendant No.2.

2.2 It is the case of the plaintiffs in the plaint that in the village Un, Taluka Kankrej, there was ancestral property of plaintiffs. In that it had

Survey Nos.63, 103, 626, 654 and 696. In all 30 Acres 5 Gunthas. According to the plaintiffs, all these lands were ancestral property of the plaintiffs. The plaintiffs have filed a suit for partition of the joint ancestral property and for taking share from the said property. According to plaintiffs, the name of father of the plaintiff i.e. Deceased Moti Okha was shown as owner of the property in the revenue record, but thereafter defendants No.1 and 2 had tried to insert their names in the revenue record.

2.3 It is the case of the plaintiffs that during the life time, the deceased Moti Okha cultivates and managing joint property and after his death the defendants No.1 and 2 make management of the joint property.

2.4 It is the case of the plaintiffs that in view of certain economic circumstances, deceased Moti Okha had left the village Un and gone to Viramgam for business purpose and thereafter he died on 16.10.1967.

2.4A It is the case of the plaintiffs that due to minor age of plaintiff, the deceased defendant Karamshi Sava and Prajapati Jethabhai Savabhai being the uncle of plaintiff makes management of joint property, but in the absence of deceased Moti Okha, defendants No.1 and 2 inserted their names in the revenue record without consent of the plaintiff.

2.5 It is the case of the plaintiff that plaintiff is the co-parcener of joint family and as defendants desires to take away the joint property of the plaintiff, the plaintiff filed a suit for partition of joint ancestral property. According to plaintiff, the property is a joint ancestral property and therefore plaintiffs have ½ share in that property and defendants No.1 and 2 have joint ½ share in that property. As defendants were not giving share in the land plaintiff filed the suit in this behalf.

2.6 Before the trial court, the defendants

No.1/1 to 1/3 i.e. Prajapati Nanji Karamshi, Prajapati Jivan Karamshi and Prajapati Maniben Karamshi and defendant No.2 Prajapati Jethabhai Savabhai had appeared and filed the written statement at Exh.14. In the written statement they have denied the contention of the plaintiff. They denied the joint ancestral property. They contended in the written statement that Un Village was Jagirdari Village during the Jagirdari. The plaintiff left the village Un and as per the Jagirdari custom the plaintiffs were became paragnada. As per the Jagirdari custom if any tenant become paragnada, the tenants have no right or share in agricultural land. As Moti Okha became paragnada prior to 50 years and left the village Un and gone to Viramgam. They contended that the property mentioned in plaint para 2 is not a joint ancestral property and the said property is Jagirdari property, and as Moti Okha left Un Village and same has gone to Viramgam as per Jagirdari custom, Jagirdar have these field to the defendants. According to them, in view of the abolition of Jagirdari and in view of the provisions

of Land Revenue Code, all entries are certified entries as plaintiffs became silent in the procedure in this behalf.

2.7 They also stated that as per Sec.29 of the Bombay Tenancy Act, the plaintiff is not entitled to get possession. They also contended that the Court has no jurisdiction in this behalf.

2.8 The defendants No.3 to 5 have appeared and resisted the plaintiffs' suit by filing their joint written statement at Exh.12. However, it may be stated that the respondents No.3 to 5 have expired during the pendency of the proceedings and the appellants have not filed any application for bringing the heirs of defendants No.3 to 5 on the record, and to that extent the appeal is abetted so far as defendants No.3 to 5 are concerned. However, Mr.D.K.Acharya, learned advocate for the appellants stated that appellant No.2 Prajapati Jethabhai Savabhai has expired on 16.5.1992 and appellant No.1/3 Prajapati Maniben Karamshi has expired on

25.11.2005.

2.9 Before the trial court, the learned trial Judge has raised as many as 12 issues in this behalf. During the pendency of the suit, from the record it appears that the matter was referred to Mamlatdar on the ground as to whether the defendants are permanent holders or permanent tenants of disputed land regarding issue No.10. The Mamlatdar by his order dated 30.6.1977 has decided the same and send the same before the trial court. The order of Mamlatdar has been produced at Exh.26. Both the parties led their oral as well as documentary evidence, and as regards various issues, the trial court findings are as under:

(1) The trial court held that the plaintiffs proved that the suit properties are undivided and joint possession of the parties as stated in para 1 and 2 of the plaint.

(2) The plaintiffs proved that the defendant has

altered their names in the revenue record without the consent of plaintiff and by that way those entries are in valid.

(3) The plaintiffs proved that the defendant sold the land bearing Survey Nos.21, 390 and 203 as illegal rights to defendants No.3, 4 and 5 and by that way the execution of sale deed out of those lands is to be invalid and liable to be dismissed.

(4) The plaintiff is entitled to get ½ share from the suit properties as prayed for by him.

(5) The learned trial Judge has held that the defendants failed to prove that the plaintiff were gone to leave village Un at the time of Jagir Rules, and as per rule of Jagir the plaintiff has no right to get possession of agriculture land as stated in para 3 of the written statement.

(6) The defendants failed to prove that the suit land was already decided by the Government at the

time of Jagirdari Abolition Act and so the plaintiff has no right to get possession of suit land.

2.10 It is the case of the plaintiff that the Mamlatdar, Agriculture Tribunal by the aforesaid judgment at Exh.26 has held that, as per provisions of Sec.5(17)(6), Entry No.37 is made and said entry is certified. However, the said finding of the Mamlatdar (i.e. ALT) has became final as nobody challenged the said finding before the higher revenue authorities.

2.11 The learned advocate for the plaintiff has submitted that Entry No.37 (Exh.45) is made and the said entry is certified, and as per provisions of Sec.108(J) of the Bombay Land Revenue Code, if any person desires to challenge the same, they have to prefer revision as per the provisions of Land Revenue Code. In view of the said finding of the Mamlatdar, deceased Moti Okha has declared as permanent holder and permanent tenant as per the said judgment by

passing purshis Exh.24.

2.12 In view of this finding, the learned trial Judge has held that Sec.29 of the Bombay Tenancy Act will not be applicable in this behalf. In view of this finding of the Mamlatdar, the court has jurisdiction to hear the suit and defendants failed to prove that deceased Moti Okha is not the permanent holder or permanent tenant of the disputed land. The learned trial Judge decreed the suit and plaintiffs have ½ share in the suit property in field bearing Survey Nos.21, 893, 390, 203 and 306 mentioned in plaint para 2. The learned trial Judge also appointed Shri K.V.Tarak as a Commissioner for giving the ½ share to the plaintiff amongst the field mentioned in plaint para 2 and the Commissioner was directed that filed bearing Survey Nos.21, 390 and 203 sold by the defendants be considered to their share and the sale done by defendants was declared as void. The said suit was decreed on 31.1.1978 with costs.

2.13 Being aggrieved and dissatisfied with the said judgment and order of the trial court, the original defendants filed Regular Civil Appeal No.11 of 1978 before the learned District Judge. The learned appellate Judge by his impugned judgment and decree was pleased to confirm the findings of the learned trial Judge and the learned appellate Judge has also raised as many as five issues and held that the plaintiffs proved that the suit fields are ancestral or joint family properties. The learned appellate Judge further held that the defendants failed to prove that the suit fields were their exclusive properties granted by the jagirdars since jagiri time. The learned appellate Judge further held that the defendants failed to prove that they are bonafide purchasers for value without notice and in view of the same the learned appellate Judge has held that the plaintiffs are entitled to claim partition as per the judgment of the trial court.

2.14 Being aggrieved and dissatisfied with the same, the original defendants filed Second Appeal

before this court and this Court was pleased to admit the Second Appeal on 6.10.1981.

3. Mr.D.K.Acharya, learned advocate for the appellants-original defendants has raised one important question of law. He stated that in this case the trial court originally raised as many as 12 issues and out of that issue No.10 was as to whether the defendants are permanent holders or permanent tenant of the disputed land and that issue was referred by the trial court to Mamlatdar court under the provisions of Bombay Tenancy Act. He has relied upon Sec.85A of the Tenancy Act which provides suits involving issues required to be decided under this Act and in view of the said section the trial court send the paper to the tenancy court to give the findings. According to him the tenancy court i.e. Mamlatdar Court by his judgment and order dated 30.10.1977 did not give any clear finding and send the papers to civil court. He submitted that in view of Sec.85A of the Act the issue is as to whether the person is tenant or nor under the provisions of

Bombay Tenancy Act has to be decided by Mamlatdar in this behalf. It was incumbent upon the competent authority i.e. Mamlatdar to decide the said issue in accordance with the provisions of the Act and thereafter shall communicate its decision to the civil court and such court shall thereupon dispose of the suit in accordance with the procedure applicable thereto. He submitted that once the Commissioner failed to determine the issue in this behalf and send it to the trial court it is incumbent upon the trial court to again send back to the Mamlatdar court for rehearing the matter.

3.1 In support of the same, the learned advocate for the appellants has relied upon the grounds no.3 and 6 of the memo of appeal which has been filed by the appellants before the District Court. He has also relied upon the judgment of this Court in the case of Koli Sona Deva (Deceased by his heirs Koli Hasur Sona and others) Vs. Shah Somanlal Mathurdas reported in 8 GLR 297.

4. On the other hand, Ms.Samira Shah, learned advocate on behalf of Mr.Saurabh N.Soparkar, learned Senior Counsel appeared for the respondents. She has invited my attention to the judgment of trial court as well as appellate court and findings recorded by both the courts below. The learned advocate has further submitted that once the trial court and the appellate court have given clear findings of facts, this Court under Sec.100 of the CPC will not interfere with the said findings given by both the trial court as well as appellate court which has been given after due appreciation of facts & law in this behalf. The learned advocate submitted that whatever grievance has been made by the learned advocate for the appellants, he ought to have challenge the order of Mamlatdar before the competent revenue court, and once the defendant failed to challenge the said finding, now they cannot agitate the said issue in this second appeal. Regarding scope of second appeal, the learned advocate has relied upon the judgment of the Hon'ble Apex Court in the case of Govindaraju Vs. Mariamman reported in (2005) 2 SCC

500 particularly paragraphs 11, 12, 13, 14, 15 and 16.

4.1 On merits of the matter, the learned advocate has relied upon the fact that in this case the trial court has held that the property is an ancestral property and the plaintiffs are entitled to ½ share in the said property. Once that is the finding of the trial court which has been confirmed by the appellate court which is a question of fact, this Court may not interfere in the second appeal.

4.2 In support of the same, she has relied upon the judgment of the Hon'ble Apex Court in the case of Mst.Kharbuja Kher Vs. Jangbahadur Rai and others reported in AIR 1963 SC 1203 particularly para 10 on page 1207. She has also relied upon another judgment of the Hon'ble Apex Court in the case of Ramchandra Pandurang Sonar (Deceased by L.R.'s) and other Vs. Murlidhar Ramchandra Sonar and others reported in AIR 1990 SC 1973.

5. I have gone through the entire record of the case as well as judgment of the trial court as well as appellate court. I have also heard the learned advocates for the appellants as well as for the respondents and also gone through the authorities cited by them in this behalf. In my view the learned advocate for the respondents is right when she contends that in this case both the trial court as well as appellate court have given clear findings of facts that the property in question was a joint ancestral property and the trial court has given finding that the plaintiff is entitled to ½ share of the said property. The said finding is based on both the documentary as well as oral evidence adduced between the parties. The learned trial Judge has given very cogent and convincing reasons for arriving at the findings which I have already set out while considering the judgment of the trial court as well as appellate court in this behalf.

6. As regards jurisdiction point regarding Tenancy

Act, the trial court has considered the order of Mamlatdar as well as provisions of Bombay Tenancy Act and Entry No.37 which has been recorded in this behalf. In fact, as per evidence Exh.26, the defendant has waived the issue of permanent tenancy by passing purshis Exh.24, and in view of this, and in view of the order of the Mamlatdar, the court has held that plaintiff's father Moti Okha was a permanent holder and therefore the contention of the defendant that by virtue of the order of Mamlatdar the court has not properly held has no basis and whole contention of the said submission is disappeared.

7. As regards appellate court also, the said contention of the learned advocate for the appellants has not been advanced before the appellate court because there is no discussion of the appellate court in this behalf. I have already indicated the findings of the appellate court and the said findings are the findings based on question of fact. In view of this, even on merits

of the matter, the appellant has no case. Over and above, the judgment of the Hon'ble Supreme Court in Govindaraju's case (supra), this Court has very limited jurisdiction and evenafter the contention raised by the appellants is not to be attracted but it was not fall within the question of law as enunciated by the Hon'ble Supreme Court in the case of Govindaraju (supra) and therefore also I am not able to appreciate the contention of the appellant and hence I find that there is no merit in the second appeal, appeal is required to be rejected. Hence the second appeal is dismissed. The judgment and decree of the trial court as confirmed by the appellate court is confirmed with no order as to costs.

(K.M. Mehta, J.)

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